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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 600.

KEZIAH REED, GEORGIANA R. SIMPSON, LILLIAN M. H. REDDING, ETC., ET AL., *Petitioners*,

vs.

LORENZO ALLEN.

BRIEF FOR THE RESPONDENT.

ALVIN L. NEWMYER,
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BRIEF FOR THE RESPONDENT.

Statement of the Case.

An understanding of the essentials of this case requires a more comprehensive statement of the facts and its history than is made by the petitioners. Especially is this true inasmuch as the equity suit is the foundation of the present and the prior ejectment suits. Instead of the equity suit being collateral to the ejectment suits, as claimed by the petitioners (Brief 5, 13), it is the pith of the ejectment suits as will be presently pointed out.

1. The Equity Suit.

On August 10, 1922, a Bill was filed in the Equity branch of the Supreme Court of the District of Columbia by one Walker to determine the ownership of certain rent he had collected from the property here involved. He named the petitioners and the respondent as defendants (R. 12).

The petitioners and the respondent were required to interplead, the petitioners on the one hand, and the respondent on the other, touching their rights to the rent which Walker had in the meantime deposited in the Registry of the Court (R. 9).

The cause then came on to be heard by the Court *upon the issues raised by the pleadings between the defendants* (R. 9).

The Court found that the determination of the question of the ownership of the rent depended upon the ownership of the real estate whence the rents were realized (R. 9, 10). So recourse was made to the Will of Silas Holmes, deceased, the common ancestor who died seized thereof (R. 10), for the determination of the ownership of and the title to the real estate. This it had a right to do. Camp v. Boyd, 229 U. S. 530, 552.

Whereupon the Court on the 24th day of July, 1925, *upon the issues raised by the petitioners on the one hand, and the respondent on the other,* decreed as follows (R. 9, 10):

> "This cause came on to be heard upon the issues raised by the pleadings between the parties defendant hereto, as more particularly set forth in their answers to the bill of complaint, said defendants Lorenzo Allen on the one hand and the defendants, Keziah Reed, et al., on the

other, having heretofore by decree entered herein been required to interplead between them touching their rights to the fund ordered to be deposited in the Registry of the Court by the plaintiff, Thomas Walker, and it appearing to the Court that the determination of the proper disposition of said money depends upon the true construction of the last will and testament of Silas Holmes, deceased, late of the District of Columbia, duly admitted to probate and record by this Honorable Court and now of record in the office of the Register of Wills of the District of Columbia, and the parties having stipulated in open court that the facts set forth in the bill of complaint and in the answers thereto as to the heirship of said parties defendant are true, and the questions of law having been argued by counsel and duly considered by the Court, it is, by the Court, this 24th day of July, A. D. 1925,

"Adjudged, ordered and decreed that the true interpretation of the aforesaid will of the said Silas Holmes, deceased, is that upon the death of said testator's daughter Virginia Allen, without leaving child her surviving, the real estate described in the bill of complaint, of which said testator died seized and possessed, is devised to Walter Holmes, the adopted son of said Silas Holmes, and to the brothers and sister of the said Silas Holmes, or to their heirs, if deceased, in equal shares, share and share alike, per stirpes; and it appearing to the Court that the fund on deposit in the Registry of the Court as aforesaid represents the rents which have accrued from said real estate since the death of the aforesaid Virginia Allen, it is,

"Adjudged, ordered and decreed that the said rents be divided among the aforesaid Walter Holmes and the other defendants hereto, who are brothers and sisters of the said Silas Holmes, de-

ceased, or heirs at law of deceased brothers and sisters of the said Silas Holmes, in equal shares, per stirpes.

"And it is further adjudged, ordered and decreed that the Court costs, including fee of guardian ad litem, shall be paid out of the assets of the estate."

Thus the Court adjudged, ordered and decreed that the real estate belonged to the petitioners, equally, as devisees of Silas Holmes, deceased, and that by reason of such ownership they were also entitled to the rent which Walker collected therefrom.

The respondent took and perfected an appeal from said decree, giving a cost bond (R. 10) which, of course, protected him, inter partes.

Upon the hearing and determination of the appeal, the Court of Appeals adjudicated that Silas Holmes' Will was inoperative and that he died intestate as to the real estate. Accordingly it reversed the appealed decree and remanded the cause for further proceedings not inconsistent with its opinion (R. 15). 57 App. D. C. 78.

When the mandate of the Court of Appeals came down the Equity Court on May 27, 1927, "vacated, set aside and for nothing held" the appealed decree of July 24, 1925, and further *adjudged, ordered and decreed* that Silas Holmes' Will was inoperative to pass the title to his real estate and that therefore he died intestate. It then directed the payment of the rent to respondent as *the sole heir at law of Silas Holmes, deceased*; the decree being as follows (R. 16):

"This cause came on to be further heard upon the mandate of the Court of Appeals of the Dis-

trict of Columbia, filed herein on the 16th day of February, 1927. Thereupon it is, this 27th day of May, A. D. 1927,

"Adjudged, ordered and decreed as follows:

"1. That the decree entered herein on the 24th day of July, A. D. 1925, be, and the same *is hereby vacated, set aside and for nothing held;*

"2. That the true interpretation of the Will of Silas Holmes, deceased, mentioned in the bill of complaint, is that upon the death of said decedent's daughter, Virginia Allen, without leaving child her surviving, the said will became inoperative as to the real estate therein described and the said testator therefore died intestate as to the said real estate;

"3. That the fee of the Guardian ad Litem herein be, and the same is hereby fixed at One Thousand Dollars ($1000.00);

"4. That the balance of the fund which is the subject matter of this suit, and which is now on deposit in the registry of this Court, be paid to the defendant Lorenzo Allen, as the sole heir at law of the aforesaid testator, after deducting therefrom any unpaid court costs herein incurred by the parties to this suit."

Therefore we have it adjudicated first by the Appellate Court of this jurisdiction on January 3, 1927, and next by the Equity Court on May 27, 1927, pursuant to the mandate of the Appellate Court, that the petitioners are not but the respondent is the owner of the real estate here involved *by inheritance* from his great grandfather (R. 15, 16).

Notwithstanding this, the possession of said real estate is withheld from the respondent by the petitioners and the present litigation arises out of his effort to obtain its possession.

2. The First Ejectment Suit, No. 71594.

Armed with the said decree of July 24, 1925, and relying upon its integrity for their support (R. 9), the petitioners, unperturbed by the pendency in the Court of Appeals of respondent's appeal therefrom, and to which they were the appellees (57 App. D. C. 78) applied to the coordinate law branch of the said Supreme Court to give them possession of the real estate which the decree of the coordinate equity branch of the Court had declared belonged to them, and also for mesne profits (R. 6).

They based their suit, their source of title and their right to possession solely upon the defeasible decree of July 24, 1925, and the items of Silas Holmes' Will which it construed (R. 8, 9). *They, of course, had no other title upon which to base a suit for possession or mesne profits.*

The respondent in reply to their declaration stated, inter alia, that the source of petitioners' title and their right to possession, namely, the decree of July 24, 1925, was pending on appeal in the Court of Appeals and that the subject matter of the declaration had been transferred from the jurisdiction of the Supreme Court of the District of Columbia to the Court of Appeals for final determination (R. 13).

To that defense the petitioners replied (R. 13) that it did not appear that the respondent had *superseded* the decree of July 24, 1925 (R. 13) and their *demurrer* to the plea was sustained, and, in due course, a judgment, *upon demurrer,* was entered against respondent for possession (R. 15), and upon trial a judgment for $1686.46 mesne profits of the real estate was awarded against respondent (R. 15). No appeal being taken from either judgment, none was neces-

sary; inter partes. United States v. Bank of Washington, 6 Peters, 8, 19.

Law Rule 30 was in force when petitioners filed their declaration. It is as follows:

> "In ejectment suits, the plaintiff shall file, along with the declaration, a list of all deeds, proceedings, or other documents relied upon as constituting his chain of title, together with a reference to the place of record of each, if recorded; and the defendant shall file along with his plea a like list. Unless, within ten days after issue joined, the respective parties shall file in the case, and serve copies as other pleadings are required to be served, a notice of objections, with the grounds thereof, to the deeds, proceedings, or documents, those not objected to shall be subject to no further proof, *but shall be subject to the ruling of the trial court as to the admissibility or legal effect thereof.*"

3. The Second Ejectment Suit, No. 74482.

Armed with the aforesaid decision of the Court of Appeals dated January 3, 1927, and the final decree of May 27, 1927, which adjudged the respondent to be the owner of the real estate here involved and by reason thereof entitled to its possession, the respondent on December 14, 1927, filed his present ejectment suit to obtain possession (R. 1, 2) and as his source of title, as required by Law Rule 30, relied upon the said decree and opinion of the Court of Appeals (R. 2).

The petitioners, *as their sole defense,* set up their final judgment in the first ejectment suit (R. 5, 6, 7), which defense was sustained by the Court (R. 20), from which action the respondent perfected his ap-

peal to the Court of Appeals (R. 20), which Court, after hearing, reversed the judgment appealed from (R. 23), and the same is now here for review.

The equity branch of the Court could and doubtless would have executed its decree of May 27, 1927, had it been requested so to do, by requiring the petitioners to give possession to the respondent. It seems, however, to have been overlooked and in consequence the present ejectment proceeding was begun by respondent to obtain possession. Root v. Woolworth, 150 U. S. 401, 410.

The Three Suits.

Therefore we have three suits instituted in the Supreme Court of the District of Columbia between the same parties and affecting the same property, viz:

(a) First, the equity suit, No. 40408, filed May 4, 1925, determining the title to the real estate, its possession, and the rent therefrom.

(b) Second, the first ejectment suit, No. 71594, filed June 1, 1926 (R. 5) by petitioners against respondent, based upon the decree of July 24, 1925, an appeal from which was at the time pending in the Court of Appeals, *for possession and mesne profits.*

(c) Third, the second ejectment suit, No. 74482, filed December 14, 1925 (R. 1) by respondent against petitioners, based upon the final decree of May 27, 1927, made pursuant to the opinion and mandate of the Court of Appeals (R. 2) and which decree reversed the first decree of July 24, 1925, *for possession and mesne profits.*

ARGUMENT.

The equity suit was in no sense collateral to the ejectment suits. It was the foundation of the first and the present ejectment suits. It alone established the title asserted by the petitioners in their ejectment suit and now asserted by the respondent in the present ejectment suit. In both suits it was relied on as creating the only evidence of title to the property here involved.

While the clear and convincing reasoning of the law applicable to the facts by the Court of Appeals in its decision needs no further support, nevertheless the following observations may be pertinent.

Restitution.

Although Mr. Justice Van Orsdel emphasizes the applicability of this doctrine to the facts of the present case, it receives only scant notice in the petitioners' brief and its controlling influence on the case is nowhere refuted by them.

This is an admission by the petitioners that they cannot escape the unyielding rule of restitution by surrendering to respondent what they gained through the enforcement of their erroneous decree. They point to no way of escape from it. Northwestern Fuel Co. *v.* Brock, 139 U. S. 216.

Notwithstanding the doctrine of res judicata now applicable to all actions alike, it has always been the law as we understand it—

(1) Irrespective of the nature of the judgment, the party against whom the erroneous judgment has been enforced does not lose his remedy against the other party to the judgment. On the reversal of the judgment the law raises an obligation in the party to

the record who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost. The mode of proceeding to effect this object must be regulated according to circumstances. United States v. Bank of Washington, *ante*.

(2) The reversal of the judgment gives a new right or cause of action against the parties to the judgment and creates a legal obligation on their part to restore what the other party has lost by reason of the enforcement of the erroneous judgment; and, as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right. United States v. Bank of Washington, *supra*.

There is nothing in the doctrine of res judicata which deprives the victorious litigant of his right to have restored to him what his adversary gained through the enforcement of an erroneous decree or which would deprive him of the benefit of his *new right or cause of action* which the reversal of the judgment gives him.

Section 1002 of the Code.

Prior to the Code of the District of Columbia judgments in ejectment were inconclusive. Lyon v. Bursey, 36 App. D. C. 235. Therefore what Section 1002 of the Code accomplished was merely to incorporate in and declare the doctrine of res judicata applicable to ejectment actions and it put them upon the same equality as other actions.

Consequently, in his opinion, Mr. Justice Van Orsdel points out that there is nothing sacred about a judgment in ejectment nor anything exceptional that does not apply to judgments in general (R. 24).

The Equity Suit.

In its last analysis the crux or essence of the subject of the equity suit was that of title; the rent being secondary.

In this connection we especially invite the attention of the Court to the apt decision of the Court of Appeals of New York written by now Mr. Chief Justice Cardozo in Golde Clothes Shop v. Loew's Buffalo Theatres, 236 N. Y. 465, 470 (30 A. L. R. 931), referred to by Mr. Justice Van Orsdel in the opinion of the Court of Appeals (R. 24).

The equity branch of the Court having first obtained jurisdiction of the subject, no coordinate branch of the Court could usurp jurisdiction. The branch of the Court that first obtained jurisdiction retained it until its final decree was made. Until the appeal from the decree of July 24, 1925, was finally disposed of, the equity branch of the Court retained exclusive jurisdiction of the subject. Mackenzie v. Engelhard Co., 266 U. S. 131, 142, 143.

The decree of July 24, 1925, adjudged the petitioners to be the owners of the property but the defeasible quality of their title by reason of the appeal was ingrafted upon it by operation of law and propagated itself through all subsequent stages, Chicago etc. R. R. Co. v. Fosdick, 106 U. S. 47, 71; Marks v. Cowles, 61 Ala. 299.

The First Ejectment Suit.

On June 1, 1926—the date the first ejectment suit was filed—the dispute between the petitioners and the respondent over the title or ownership of the property had been decided by the equity branch of

the Court *pursuant to the issues raised there* and the correctness of that decision was pending before the Court of Appeals. No other branch of the Court, therefore, could supplant the exclusive jurisdiction of the Appellate Court to finally decide the question of title.

No controversy can be treated as res judicata until it has been finally discussed and decided in a court of last resort. Eastern Building and Loan Association v. Welling, 103 Fed. 352, 355.

There was and could be no issue of title involved in the first ejectment suit and none is involved here. In the first ejectment suit the petitioners presented the decree of July 24, 1925, as their evidence of right to possession, and the Court, under Law Rule 30, passed upon the legal effect thereof. There could not possibly be any title established by the ejectment suit as that was the question adjudged by and involved in the defeasible decree of July 24, 1925, upon which the ejectment suit was predicated. Likewise no title is to be adjudicated in the present ejectment suit. That has been disposed of by the final decree of May 27, 1927.

The Second Ejectment Suit.

Although the final decree of May 27, 1927 (R. 16) adjudged the respondent to be the owner of the property, its possession is detained from him by the petitioners upon the pretence that their title is superior to that of the respondent by virtue of Section 1002 of the Code. In other words, it is the petitioners' contention that the final decree of the first branch of the Supreme Court of the District of Columbia passed May 27, 1927, pursuant to the mandate of the Court

of Appeals, is merely a piece of waste paper and entitled to no faith or credit because while the appeal was pending in the Court of Appeals from the decree of July 24, 1925, they procured a final judgment against respondent for possession of the property based upon their decree: That is to say, it is the petitioners' contention that a coordinate law branch of the Supreme Court of the District of Columbia can divest the Appellate Court and the coordinate equity branch of their jurisdiction to establish title and do so itself, and thereby defeat any final decree that the first Court might make pursuant to the mandate of the Court of Appeals.

The Court of Appeals, through its very learned opinion written by Mr. Justice Van Orsdel, has decided that the final decree of May 27, 1927, is entitled to full faith and credit; that it puts an end to the question of title and the right to possession and it must be respected; that the coordinate law Court had no jurisdiction of the question of title as that was exclusively pending in the equity branch of the Court and any attempt to invoke the aid of the law branch was necessarily subordinate to, ancillary and dependent upon the final decree in the equity branch of the Court.

Res Judicata.

For the Court of Appeals to have decided that Section 1002 was a barrier to respondent's suit would have been unconscionable as well as opposed to the law; *it would have permitted petitioners to retain possession of property they do not own, never owned and were never rightfully entitled to possession of,* according to the final decree of May 27, 1927.

In their specification of error (petitioners' brief, p. 6) the petitioners do not complain that the decision of the Court of Appeals is unjust and not consonant with fair dealing or even that they are wrongfully deprived by it of any rightful possession of the property. Their sole complaint is that it ignores a general proposition of law, namely, res judicata, which proposition as has been pointed out plays no part in the present case.

The true test of the identity of causes of action *is the identity of the facts essential to their maintenance.* Pierce v. National Bank of Commerce, 268 Fed. 487, 496. Union Central Life Insurance Co. v. Drake, 214 Fed. 536.

The respondent's possession was taken from him in the first ejectment suit because he could not trace title to himself. He should not be defeated in the present ejectment suit, by reason of the final judgment in the first ejectment suit, when he presents and traces a paramount title to himself since acquired by the decree of May 27, 1927, made pursuant to the mandate of the Court of Appeals, and which decree established title, inter partes. Barrows v. Kindred, 4 Wall. 399.

This Honorable Court in United Shoe Machinery Corp. v. United States, 258 U. S. 451, quoted the doctrine of res judicata from Cromwell v. County of Sac, 94 U. S. 351, 352, as follows:

> "'There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case,

> the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action * * * concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the demand or claim, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined."

And the Court then goes on to say—

> "In other words, to determine the effect of a former judgment, pleaded as an estoppel, two questions must be answered: (1) was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit determinative of the matter in controversy in the second suit? To answer these questions, we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy."

In the first ejectment suit the petitioners relied upon the defeasible decree of July 24, 1925, as their evidence and source of title while in the present eject-

ment suit the respondent relies as his source of title upon the final decree of May 27, 1927. Obviously, therefore, the rights of the respondent were not and could not have been adjudicated in the first ejectment suit because they were not established until after the final judgment in the first ejectment was rendered. Consequently the judgment in the first ejectment suit was not rendered on the same matters which are involved in the present ejectment suit.

The principle of law which runs throughout the decisions and textbooks on ejectment was stated by the Court in Bird v. Cross, 123 Tenn. 419, thus:

> "There can be no doubt that a judgment rendered in an action to recover possession of real property under the system of pleading and practice adopted in this State, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies and a bar in another action between the parties or their privies when the same matters are directly in issue. *The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered; and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters occurring after its rendition, which give the defeated party a title or right of possession.*"

To the same effect are:

> Barrows v. Kindred, *ante*; Merryman v. Bourne, 9 Wall. 592, 599; Watson v. Jones, 17 Wall. 679; Gore v. Gore, 101 Tenn. 620, 624; Thrift v. Delaney, 69 Cal. 188; Breon v. Robrecht, 118 Cal. 469; Mahoney v. Van

Winkle, 33 Cal. 448; Foster v. Evans, 51 Mo. 39; Hawley v. Simons, 102 Ill. 115, 120; Prewitt v. Wilborn, 184 Ky. 638; Gajan v. Patout & Burguieres, 135 La. 155, 157; Sherman v. Dilley, 3 Nev. 1, 22; Freeman on Judgments, Vol. 2, Sec. 714, p. 1507; Warvelle on Ejectment, Sec. 492, p. 547; Ruling Case Law, Vol. 9, p. 926; Black on Judgments, Vol. 2, Sec. 656, p. 996.

Respondent acquired his title with the right to possession after the execution of the erroneous decree of July 24, 1925, in the first ejectment suit; in the first ejectment suit respondent had *no evidence* of title to assert and consequently no right to possession at the beginning or ending of that action; respondent's *present title* and right to possession were not litigated in the first ejectment suit and respondent's *present evidence of title* and right to possession did not exist and was unavailable to him at the beginning and conclusion of the first ejectment suit.

CONCLUSION.

It is respectfully submitted, in conclusion, that the decision of the Court of Appeals is right and should be affirmed.

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